No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,

Appellant,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Appellee.

Reply Brief

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

HON. CHASE A. CLARK, District Judge

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Appellant contends that, when the entity sought to be investigated denies that it is within the contemplation of the Fair Labor Standards Act, before a Subpoena is ordered there must be a determination of coverage, or that *at least* the administrator must make a sufficient factual showing to assure the Federal Court "that it is not giving judicial sanction and force to unwarranted and arbitrary action, but that reasonable grounds exist for making the investigation." Walling v. Benson, 8 Cir., 137 F. 2d 501; Okla. Press Pub Co. v. Walling, 147 F. 2d 658.

Appellee on the other hand contends that "a determination of coverage is not a condition precedent to the judicial enforcement of the subpoena" (Appellee's brief, p. 6); that although "requiring some showing of 'probable cause' places a heavier burden on the Administrator than is warranted, there is a sufficient showing in the instant case" to meet this requirement.

So, we see that both appellant and appellee have a two-pronged contention, there being a direct clash upon the legal question of whether coverage should be determined prior to judicial enforcement of the Administrator's subpoena duces tecum, and anti-
rb ethical contentions upon the *fact* question of whether the the Administrator has made a sufficient showing

to assure the Federal Court that appellant is probably within the Act.

Then, we have the District Court's ruling that the only purpose of the hearing was to have an enforcement order issued, which of course supports the appellee upon the legal question of the proper time to determine coverage, and we also have the District Court's finding that the weight of the evidence, upon the factual question of whether appellant is within the Act, is in favor of appellant. As stated in appellant's opening brief, there being no appeal by appellee from this factual finding of the District Court, it cannot be here disputed that the weight of the evidence is to the effect that appellant is not one of the businesses subject to the Fair Labor Standards Act.

Therefore, with the issues thus framed, it would seem that the appellate court must do one of the following things: (1) Make a clear-cut decision as to whether, when appellant claims to be without the Act, a determination as to coverage is a condition precedent to obtaining an enforcement order; (2) Make a clear-cut decision as to what facts the Administrator must show when appellant claims to be without the Act. A decision on the second point would necessarily have to be in appellant's favor because of the established fact that the weight of the evidence is to the effect that appellant is not within the Act, which of course means appellee has

not advanced sufficient grounds to show that reasonable grounds exist for making the investigation.

Time to Determine Coverage

Why is appellant so insistent upon a determination of coverage at this time? Because appellant wishes to put an end to all this litigation and unnecessary expense. Because appellant wants to know where it stands, whether it must comply with all the regulations of the Fair Labor Standards Act, and whether the salaries of its employees will be lowered as so often happens when a particular business is brought within the Act.

On the other hand, suppose that the determination of coverage is put off until some future date which may well be several years from now. Appellant, believing it is without the Act, will proceed as though without the Act, be forced to go through more and more litigation, incur more and more expense, run the risk of violating innumerable rules and regulations, until coverage is finally settled.

On page 6 of appellee's brief it is stated: "All the Circuit Courts of Appeals which have ruled upon this question are in agreement that enforcement of the Administrator's subpoenas is not dependent upon a prior hearing on, or determination of, the issue whether the employer is subject to the Act." Before we examine the cases cited in support of that bold statement, we call the Court's attention to this in-

consistent statement also on page 6 of appellee's brief: "Appellant relies heavily upon the decisions in General Tobacco & Grocery Co. v. Fleming . . . and In re Application of Walling . . . in both of which cases the courts held that the enforcement of the subpoena depended upon a showing that the employer was subject to the Act."

In Martin Typewriter Co. v. Walling, 135 F 2d 918, (C.C.A. 1), as pointed out on page 18 of our opening brief, the employer admitted that it did some interstate business. Here, appellant denies that it does any interstate business. Walling v. Standard Dredging Corp., 132 F. 2d 322, C.C.A. 2nd, gave blanket approval to In Re Standard Dredging Corporation, 44 F. Supp, 601, which held the Administrator need make no showing to obtain enforcement of his subpoena. In Walling v. News Printing Co., 148 F. 2d 57, C.C.A. 3rd, the following language appears to be considered: "From the affidavits filed by the respondent it appears that some of the newspapers published by the respondent move in interstate commerce." Miss. Road Supply Co. v. Walling, 136 F. 2d 391, C.C.A. 5th, is in appellant's favor for it says:

> "But if it is made to appear that the investigation is clearly without just authority, as that the person investigated is clearly not under the Act and that grave inconvenience or injury

> may result, the Court may very properly decline to assist."

In Walling v. LaBelle Steamship Co., 148 F. 2d 198, C.C.A. 6th, which appellee states "clearly abandons the position that a hearing and determination of coverage is a prerequisite to enforcement of a subpoena" (Appellee's brief, p. 7), it was stated: "Here appellee admits it is engaged in interstate commerce . . ." In that case, the Circuit Court again distinguished the Endicott-Johnson case thus:

> "The Walsh-Healey Act commits to the Secretary of Labor the issue of coverage of employees by employers doing business by voluntary contract with the United States Government. The ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts. Because of this distinction, the Endicott-Johnson case is distinguishable from the case at bar. Oklahoma Press Publishing Company v. Walling, 10 Cir., 658 F. 2d 147."

In Fleming v. Montgomery Ward & Co., 114 Fed. 384, as stated in the footnote, page 603, to the case of Application of Holland, 44 F. Supp. 601, "Since respondent is subject to the Act, the investigation is a lawful inquiry." As stated in our opening brief, Walling v. Benson, 137 F. 2d 501, C.C.A. 8th, required the Administrator to make a showing sufficient to convince the District Court that the one

sought to be investigated was probably within the Act. The case of Oklahoma Press Pub Co. v. Walling, 147 F. 2d 658, distinguished the Walsh-Healey Act from the Fair Labor Standards Act thus:

> "Unlike the Walsh-Healey Act, the ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts and not to the Administrator. We do not think that the philosophy of Endicott-Johnson Corp. v. Perkins, supra, is authority for the contention of the Administrtor to the effect that the courts are deprived of the power of discretion in the performance of the judicial function expressly committed to them and denied to the Administrator."

The above discussion shows conclusively that there is a definite split upon the legal question of when coverage may be determined.

On page 8 of appellee's brief is outlined the theory conceived and adopted by the appellee and the authorities supporting appellee. It is true that the Administrator is authorized to conduct investigations, issue subpoenas and that the District Court is empowered to enforce those subpoenas. But does the empowering of a District Court to do certain things mean that it has no discretion in determining whether or not it should do those certain things? Such an idea is repugnant to the Constitution of the

United States and the dignity of every Court in the land.

Do the statutory provisions cited by appellee, sustain his contention that the office of the Federal Courts in matters of this type is but another step of technical procedure, and in order to obtain license to invade the privacy of any business in the United States all the Administrator need do is plank down in Federal Court the necessary filing fee in the same manner as a hunter obtains a hunting license, and then the Administrator may hunt to his heart's content?

Of course not; Section 9 of the Federal Trade Commission Act, which is adopted by Section 9 of the Fair Labor Standards Act, provides:

> ". . . in case of disobedience to a subpoena the commission (here Administrator) may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order to appear before the commission, or to produce documentary evidence if so ordered, or to give

> evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

It is difficult for appellant to find anything in the above statute that makes it mandatory upon the District Court to enforce the Administrator's subpoena duces tecum. How can that statute, which contains only permissive language, be turned into an ultimatum to the District Court?

Well, Sec. 11. (a), of the Fair Labor Standards Act first undergoes an amputation. It becomes not one sentence, but two, each with a separate and different name, a separate and different meaning and a separate and different applicability. Then, the two sentences, with their own peculiar meanings, are fused into one again, and in some mysterious way, "may" has become "must," and, in the interest of expediency of an administrative proceeding, the discretion of a Federal Court to issue or deny enforcement of a subpoena is done away with. The opinion of the Administrator supplants that of the Federal Court.

Let's see what Sec. 11(a) looked like before it was disfigured:

> "Sec. 11(a) *The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and*

> *other conditions and practices of employment in any industry SUBJECT TO THIS ACT* and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act . . ."

The first portion of the above section, the italic portion, is, we are told, an investigation "for the purpose of gathering statistical data and is not a means of enforcing the Act." (Appellee's Brief, p. 8). The latter portion, "Investigations of the second type, like the one involved here, are for the purpose of law enforcement" ,(Appellee's Brief, p 8), states appellee, i. e., to determine whether any person has violated any provision of the Act. But in order to determine whether any person has violated any provision of the Act, the two types of investigation above mentioned "must relate to coverage as well as underpayment," because "both of these are, equally, essential elements of violation," and "The subpoena here involved properly related to both." (Appellee's Brief, p. 9). Consequently, continues the Administrator, he should not be required to prove coverage because that is the whole thing in a nut-shell.

After reading and studying the arguments of both

appellant and appellee, hyper-technical though they may be, we see that, no matter how you may belabor it, the naked issue before the Court is whether the statutes heretofore discussed relegate a Federal Court to a position subject to the beck and call of the Administrator of the Fair Labor Standards Act.

Walling v. Roland Electrical Co., 146 F. 2d 745, does not support the Administrator's contention that appellant is not a retail or service establishment within the exemption clause of the Fair Labor Standards Act. We find in syllabus No. 6 of that case:

> "Where practically all of customers of employer engaged in repairing and rebuilding electric motors and in repairing and installing electrical wiring were commercial or industrial firms, employer was not a 'retail or service establishment' within provision of Fair Labor Standards Act exempting employees of such establishments . . ."

It is then implied that appellant serves commercial or industrial firms so that it can be brought within the ruling of the above case. Appellant specifically stated that the work is "in connection with its retail service business of insulating homes."

Appellee states that the implication of appellant's contention is that the Administrator has the burden of disproving exemptions. What appellant desires

is an honest-to-goodness hearing on the Order to Show Cause. Appellant wants an opportunity to prove that it is not within the Act. As stated on page 28 of appellant's opening brief :"It seems to us a mockery of Justice that in America, a litigant must plead with the Courts TO BE HEARD."

Probable Cause

Appellee (Appellee's Brief, p. 17) argues that there is probable cause to support the issuance of the Administrator's subpoena, although he thinks that the "decisions requiring some showing of 'probable cause' place a heavier burden on the Administrator than is warranted." (Appellee's Brief, p. 18).

Appellant thinks that the Fair Labor Standards Act imposes on the district court, at the very least, the duty of satisfying itself that the Administrator has reasonable ground for believing that appellant's business is subject to the Act. No such showing was made, or even attempted, in the instant case. The Administrator merely asserted, upon information and belief, that appellant is engaged in interstate commerce or in the production of goods for interstate commerce; and further, also upon information and belief, that he had reasonable grounds for believing that appellant had repeatedly violated the Act. Appellant specifically denied being engaged in interstate commerce or the production of goods for interstate commerce, and also alleged that it was a retail

service establishment within the exemption of the Act, all being supported by affidavits of fact.

Section Nine of the Federal Trade Commission Act, which is incorporated into the Fair Labor Standards Act, expressly gives the district court discretion in the issuance of such subpoena as sought. It calls for the exercise of the independent judgment of the district court. It does not contemplate blind approval of unsubstantiated administrative action where jurisdiction is completely denied. There is nothing to be inferred to the contrary from the Endicott-Johnson case. With regard to the Walsh-Healey Act there under consideration, the Supreme Court said: "It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." The procedure of the Secretary of Labor in that matter was strictly in accordance with the provisions of the Walsh-Healey Act. Endicott-Johnson production was admittedly devoted in part to government contracts and subject to that Act. It is true that originally the Supreme Court had accepted the case partly because of possible conflict with General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596, 140 A.L.R. 783, which held that in a Fair Labor Standards case, coverage must be proved as a prerequisite to enforcement. The opinion, however, was confined solely

to interpretation of the Walsh-Healey Act. It is so construed in Walling v. Benson, 137 F. 2d 501, 506. There, as here, the Administrator made no showing at all. The entire basis of that decision is that the Administrator must show the equivalent of probable cause in order to have the district court issue such subpoena, with the court holding that the extent of the showing in an individual case "must necessarily and fundamentally be left to the sound discretion and judgment of the district court." The Benson matter was sent back to the district court to permit the Administrator "to amend his application, if he can and wishes to do so, to allege that he has reasonable ground to believe that appellee's business is subject to the Act, as a basis for any showing that he is able and may desire to make on the further hearing in the district court."

Appellee states that the case of Bowles v. Glick Bros. Lumber Co., 146 F. 2d 566, decided an issue similar to the one here under consideration. A reading of the quotation from that case on page 7 of appellee's brief, clearly reveals that the important question of jurisdiction was not there considered. In that case it was said: "The existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection . . ." Appellant contends that there must be probable cause for believing that the Act applies to the particular business, here appellant.

Appellee contends that the purchasing of goods

outstate (p 19) constitutes interstate commerce, citing in support thereof Fleming v. Jackson Paper Co., 63 Sup. Ct. 332.

In that case, the United States Supreme Court made it clear that a retailer, such as appellant, who purchased goods outside the state for sale within the state, was *not* within the Act, by stating: ". . . the exemption for retailers contained in section 13(a)(1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included."

Phillips v. Walling, 144 F. 2d 102, and Walling v. Mutual Wholesale Food & Supply Co., 141 F. 2d 331, both dealt with chain store organizations and clearly do not support the above contention of the appellee.

The decision of the District Court should be reevrsed and the order herein appealed from vacated.

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